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NICHOLAS FULLER: A FORGOTTEN EXPONENT OF ENGLISH LIBERTY

IN 1604, Nicholas Fuller, barrister at law of Gray's Inn, opposed the royal measures in Parliament, and offended the King by his caustic utterances. When the Puritan ministers were deprived in the following year, he sought to block the episcopal proceedings against them by attempting to transfer their cases to the common law courts. Finally, he impugned the authority of the High Commission; declared it illegal; denied in fact the existence of the royal prerogative under which the letters patent to the Commissioners had been issued; and maintained his contentions in the face of the High Commission, the common law courts, the Privy Council, and the King himself. Fuller was thus one of the first men of great ability who persistently employed their energy and talents in constitutional opposition to the Crown. It is true that Peter Wentworth, in known contravention of Elizabeth's wishes, had demanded liberty of speech in the House of Commons in 1576; that the election of Sir Francis Goodwin to Parliament for Buckinghamshire had furnished the pretext for a quarrel between the King and the House of Commons which had momentous constitutional results; and that two years later, John Bate, a London merchant, took to law the question of the import tax on currants. Yet in none of these cases was there actual constitutional opposition to the Crown. Wentworth invoked only an ethical right, Goodwin took no part in the dispute which bears his name, and Bate had requested and had received an authoritative decision of what the law was, but made no further attempt to avoid its application. It remained for Fuller in 1607 to attack the King's prerogative more explicitly. When defeated on one ground, he resumed the struggle upon a second, and then upon a third, until James and Salisbury began to think they would never silence "the graceless rogue." In truth, he has a place in English constitutional annals and in the long fight of Parliament against the Crown, because he voiced in his speeches, perhaps for the first time in such unmistakable fashion, the political theories which Hakewill and Coke developed into a system and which Pym and Hampden finally carried to victory in the Long Parliament.

When Fuller was arrested in 1607 by the High Commission for impugning its authority by his speeches in defence of Ladd and Mansell, he was already a marked man. A barrister of standing and a member of Gray's Inn, he sat in James's first parliament and had made his presence felt by his activity in committees and on the floor of the House. He had declared himself in favor of delaying the subsidies of which the King stood in such dire need.¹ He had presented bills complaining of pluralities and non-residence among the clergy of the Established Church, and urging that all ministers be limited to one cure and be required to reside upon it.² When the Puritan ministers were deprived in 1605 for their refusal to conform to the canons of the church he spoke in the House in their favor and attempted to defend them in the courts.³ Bate's case and the imposition on currants, a matter which James had much at heart, did not fail to stimulate Fuller to new exertions.⁴

But his greatest activity and most offensive conduct appeared in regard to the union with Scotland. King James, like most other Scotchmen, could ill brook derogatory flings at his country and the notorious poverty and quarrelsomeness of its people. He was furthermore eager to see that nation united to England and fondly hoped to bear in history the proud cognomen of peacemaker, as the king who had buried the old feuds by a bloodless conquest. But the English people as a whole did not look with favor on James's plans, and none was more outspoken in expressing his reasons than was Fuller. In committee and on the floor of the House he vigorously fought the new union. He likened England to a rich pasture surrounded by a fence and pictured the Scots as lean and hungry kine roaming eager-eyed along the boundary, seeking an opening. He dilated upon the dearth of good things which Englishmen would experience when that hungry herd from the North entered the rich fields by a broad and open gate.⁵ There was not room in England for a single Scotchman, he declared. The fact that Fuller had expressed the sentiment of the majority of Englishmen did not render him less objectionable to James and his councillors.

Fuller's activity in Parliament by no means exhausted his energy. Inclined to Puritan doctrines himself, he placed his legal learning at the disposal of such of his co-religionists as were unfortunate enough to come into contact with the courts. Deprived ministers and laymen captured at conventicles were in the habit of seeking

¹ *Commons Journals*, I. 276.

² *Ibid.*, 286.

³ *Ibid.*, I. 285.

⁴ *Ibid.*, 294.

⁵ *Ibid.*, I. 334.

his advice in hope of finding some legal loophole by which they might escape the impending sentence.¹ Ladd, the client whom he was defending when he delivered the speech against the High Commission, was a Puritan layman caught at a conventicle. In the month previous to the audacious outburst which so nearly proved fatal to him, (April, 1607), Fuller had only just missed coming into conflict with the Commission on a similar case. That body had summoned some twenty persons in Yorkshire to appear at London to answer various charges against them, and on their failure to come had imposed a fine upon them, as was provided by the ordinary process of the Commission. Fuller, whom the delinquents retained as their counsel, at once made a motion in their favor at the bar of the Exchequer, asking for a writ of habeas corpus from that court, which if granted would have freed them for the time at least from the Commission. He seems also to have made a similar request in the King's Bench. In one or the other court he had hinted pretty broadly that he did not think the commissioners were competent judges in such matters and that at any rate their use of the oath *ex officio* seemed to him flatly illegal; on examination before the Commission, he had maintained his position and was told that if he continued to express such opinions to the derogation of that body, he would be imprisoned in short order.²

Fuller, therefore, must have known that he was by no means an insignificant man who could say what he pleased with little chance of its being noticed by those in authority. Yet with the threat of the archbishop still ringing in his ears, he possessed so unusual a degree of courage that he proceeded to deliver in public within a month an even more scathing arraignment of the High Commission. This speech was therefore no chance effusion uttered in a thoughtless moment by a man of no standing and caught up and prosecuted by a querulous and tyrannical government.³ It was another of a

¹ Papers found on Melancthon Jewel, a fanatical Puritan arrested in December 1604, contained a memorandum "To shewe Mr Nicholas Fuller what the Bishop proclaymeth of hime, and to requier his verie beste." State Papers, Domestic, James I., X., no. 81.

² *The Argument of Nicholas Fuller in the case of F. Lad and R. Maunsell, his Clients. Wherein it is plainly proved that the Ecclesiastical Commissioners have no power, by vertue of their commission to imprison, or put to the oath ex officio or to fine any of his majesties subjects* (London, 1607; reprinted, London, 1641), pp. 22-23. This evidence comes from Fuller himself, and seems trustworthy. But inasmuch as the tract was published by Fuller's friends long after he was imprisoned in hope of exciting public sympathy in his favor, it is just possible that this may be a distortion of a real occurrence inserted to show that the Commission was persecuting him.

³ Such has been the ordinary view taken of Fuller's case.

long series of overt and unqualified attacks upon the plans of the government by a man who had many times demonstrated his animus and his ability to accomplish whatever he undertook under its spur.

Thomas Ladd, Fuller's new client,¹ was a merchant of Yarmouth, and had been tried in the ecclesiastical court at Norwich for attending a conventicle at the house of one Jackler, a nonconformist minister, who had been deprived for his refusal to observe the canons of the church. The record of his institution at Norwich shows that he had conformed in 1603, and that he possessed no degree of any sort from any university. He was therefore neither a consistent nor a learned man. Ladd declared in his defence that he and his friends had held no conventicle, inasmuch as they only met privately to go over the sermon preached on Sunday morning by the minister of the Established Church; but there can be little doubt that those present added statements of their own and that the meeting was in strict law a conventicle. This however was not the issue in the case. Ladd had made some difficulty about taking the oath *ex officio*, and after he had testified and a considerable discrepancy between the various answers became apparent, he was summoned to Lambeth upon a charge of perjury. There he refused to take the oath *ex officio* at all unless he was first allowed to peruse the answers he had made at Norwich. The procedure of the High Commission made it impossible to grant this request and he was therefore committed to prison, March 29, 1607. Fuller's other client, Mansel, a nonconformist minister, had been arrested as one of the movers of a petition to the House of Commons, which the government thought offensive, and having also refused to take the oath *ex officio* unless he was allowed to see the charge against him, was likewise imprisoned.

At this juncture, Fuller was retained as counsel for the two prisoners and at once took charge of the case. He soon procured

¹ The authorities for this most interesting episode are (1) Lansdowne MSS., 1172, f. 97, which is the only trustworthy source for the dates and actual facts. It purports to be a full report of the case and contains a long Latin account of the events leading up to Fuller's commitment by the High Commission, then quotes the writ of committal in full in English, then gives in Latin the consultation issued by the King's Bench, and closes with some further notes of the case in Latin. It was probably prepared either for use at the hearing before the King's Bench in September, 1607 on the consultation on the prohibition, or was employed by Hobart in the hearings on the habeas corpus in November, 1607. It is just possible that it was prepared by a news-writer and circulated for information. In any case it is far more trustworthy than (2) the tract entitled *The Argument of Nicholas Fuller*, which is only an ex-parte statement by Fuller's own friends, which we know omits much that he admitted he said, and which adds more which it is reasonably certain he did not say.

from the King's Bench writs of habeas corpus for the two men (April 30, 1607) and secured May 6 as a date for the hearing. In his argument, he proceeded to prove¹ to his own satisfaction at least, that his clients must be released because the High Commission had no legal authority to imprison them. That court, he declared, was based upon the statute of 1 Elizabeth, c. 1., section VIII., which gave to the commissioners only such power as the bishops of the Church had possessed before the passage of that statute. By references to acts of Parliament, and by somewhat questionable deductions and analogies from them, he sought to demonstrate that the bishops had never had authority previous to 1559 to fine or imprison. The Commission therefore could possess such a power, he asseverated, only by an act of Parliament, and the statute of 1 Elizabeth, the only one which could legalize the exercise of such authority, did not sanction it. He then read the act in court and interpreted it for the edification of his audience. Finally he proceeded to compare the extensive powers which every one knew the Commission employed, with the grant of authority to them in the act, and pointed out in voluminous detail and with many comments derogatory to the Commission, the discrepancies between the two. He paid little attention however to the fact that the royal letters patent which the statute did authorize, conferred on the High Commission by express language or by implication every power it put in practice. It was enough for him that the statute itself did not directly make any such comprehensive grant.

His argument was offensive enough, but his comments² made it "smell to heaven". He declared that the manner of proceeding in the commission was "popish"; that "the ecclesiasticall jurisdiction was Anti-Christian" and "not of Christ but of Anti-Christ"; that the power of the Commission was being used to suppress the sacrament and true religion. To his mind, the bishops "did proceede in these dayes by taking an ell whereby they had but an ynnch granted them, and in examining men upon their oathes at their discretion

¹ Exactly what Fuller said at these two hearings is very difficult to determine satisfactorily. The indictment of the High Commission against him given in Lansdowne MSS., 1172, does not detail his speech but only recounts the points to be used legally against him. The tract which is ostensibly the actual speech he delivered, is certainly only a speech which he drew up (if he ever wrote it at all) after these two hearings, for use before the twelve judges in September, 1607 (Hatfield MSS., 124, f. 59). The tract was printed in December, probably without his knowledge (Hatfield MSS., 124, f. 81). Nevertheless, the main legal contention there set forth may be accepted without much hesitation as the substance of what he said on May 6 and June 13 much expanded and embellished, and with many significant omissions.

² These are to be found only in Lansdowne MSS., 1172.

and indiscretion as such their dealings were now lamentable". The oath they administered tended "to the damning of their souls that take it". Men were imprisoned whenever the commissioners saw fit, and "they detained them in prison as long as they list". Having said this much and more on May 6 and finding himself still at liberty, he took heart and at the second hearing on June 13 launched forth upon a further set of diatribes which capped the climax of his "insolence". He did not scruple to hint that the commissioners embezzled all the fines they collected and were in process of extending their authority so as to embrace every branch of criminal and civil law. The judges of the King's Bench, before whom this remarkable argument had been delivered, debated among themselves, but made no decision in the matter, and instead reserved the case for further hearing before all the judges. But Fuller never argued the question further, for he was taken into custody by the High Commission. His indiscretion in making such virulent comments caused the main point which he had raised—the illegality of the High Commission—to drop out of sight, and with it disappeared Ladd and Mansel, whose fate we do not know.

Dr. Gardiner states¹ that Fuller procured from the King's Bench for Ladd and Mansel a consultation, "a modified form of prohibition". There is however no statement in any of the authorities that the court took any action at all beyond ordering a new hearing before the assembled judges, which, according to Fuller himself,² was certainly commanded, for which Fuller prepared the speech afterwards printed, but which hearing never was held, inasmuch as Fuller himself was a prisoner when the court met in September. Furthermore a consultation was not a modified form of prohibition, but the authoritative annulling of a prohibition by the court which had issued it. On "consultation" with the lawyers from the court prohibited, the judge perceived that he had issued the prohibition wrongly and authorized the court prohibited to proceed as if no such writ had been issued. A consultation could only follow a prohibition, and could in no case issue as an original writ, as Dr. Gardiner elsewhere infers. Moreover as Ladd was before the King's Bench on habeas corpus and not upon prohibition, the court either must remand him to prison or free him altogether; there could be no half-way procedure. Dr. Gardiner seems to have confused the consultation issued to Fuller himself in September on the prohibition he procured in July for himself, with the action taken by the King's Bench in Trinity Term on the habeas corpus granted in April to Ladd.

¹ *History of England*, II. 37.

² Hatfield MSS., 124, f. 59.

The High Commission acted promptly and arraigned Fuller in July¹ upon a long list of "scandalous" things he had "factiously and falsely" affirmed "to the slander of the Church, to the hardening of the Papists" and "to the malicious impeachment of his majesty's authority in Causes Ecclesiasticall". The case was heard before Bancroft, the archbishop, Ravis, bishop of London, and other leading men of the High Commission. Fuller however had been not less prompt than the commissioners, and before the case could be put through the necessary legal stages preceding sentence he had procured a prohibition from the King's Bench. This writ, granted by Justices Fenner and Croke in the vacation after the close of Trinity Term, forbade the Commission to proceed further against Fuller on the ground that the case should properly be heard in the King's Bench.² Pending the return of the prohibition and argument in its defence (which because of the long summer vacation of the courts could not be heard till late in September) the matter perforce rested. Although the High Commission could not convict Fuller, he none the less spent the intervening months in jail at the White Lion, Southwark.

When the news of Fuller's daring and its consequences reached James and his counsellors, they were angry indeed and were besides in a measure apprehensive of further developments. Lord Salisbury, the secretary of state and practical ruler of England, wrote to Sir Thomas Lake, the secretary in personal attendance upon the king, that Fuller's actions would end by affecting the stability of the government—"noe monarchy beeinge able to stand where the Church is in anarchy". The "absurd" action of the judges in granting such a man a prohibition for so slender a reason had, he thought, "given so apt occasion to make a president for the like mischeife as in the effect thereof may be well resembled to fayre fruite gathered from rotten trees"³ James, too, feared evil results if the au-

¹ Fuller was protected until July 4, when Parliament was prorogued, by his parliamentary privilege; he was present in the Commons on July 1, so cannot have been imprisoned until the second week in July.

² Dr. Gardiner states that Fuller was not imprisoned or proceeded against by the High Commission till November; but Lansdowne MSS., 1172, says explicitly that he was arraigned early in July (just after the close of Trinity Term), and in that same month secured a prohibition from the King's Bench. Here again Dr. Gardiner repeats the curious error that a prohibition and a consultation are the same. Fuller's own statement (in a paper that could hardly have been written later than the following March, 1608) that he had been in jail nine months, exactly tallies with this reading. He was certainly released for good in April, 1608, and could not have spent nine months in jail between November, 1607, and March, 1608.

³ Hatfield MSS., 124, f. 135, July?, Salisbury to Lake. Draft.

thority of the Commission was seriously impeached. Constitutionally timid, the discovery in succession of Watson's Plot, Cobham's Affair, and the Gunpowder Treason, had led James to fear an outburst of anarchy from almost any source. "I praye yow," he wrote to Salisbury with his own hand somewhat later, "forgette not Fullers maitter that the ecclesiasticall comision maye not be sufferid to sinke besydes the euill desairtis of the uillaine, for this farre darre I prophecie unto you, that quhen soeuer the eclesiasticall dignitie together with the Kings gouuernemente thairof shall be turnid in contempte and beginne to euanishe in this kingdome, the kinges heiroy shall not long prosper in thaire gouernment and the monarchie shall fall to ruine, quhiche I praye god I maye neuer liue to see and so fairwell."¹

In due time the judges returned from the summer circuits, and toward the end of September resumed their duties on the bench at the opening of Michaelmas term. One of the very first matters brought up was the prohibition issued to Fuller. In view of the importance attached to his attack on the Commission, the judges of the King's Bench took counsel upon the prohibition with the judges of the Common Pleas and with the barons of the Exchequer. The practice of the King's Bench rendered such a writ valid to stay proceedings in the Commission only until an argument could be had before the bar of the court upon the respective rights of the two jurisdictions to take cognizance of that particular matter. Only two courses were properly open to the judges: they could uphold the prohibition and thus declare their sole right to adjudicate the case, which was in fact what Fuller wanted; or they could issue a consultation annulling the prohibition and giving the High Commission leave to proceed. The latter would practically be a confession that they had acted hastily in forbidding the Commission to proceed against Fuller, that they recognized the Commission's right to hear the suit, and therefore licensed them to conclude the case as if no prohibition had ever issued. When opinions had been exchanged, it developed that the judges were divided: some wished to maintain the very letter of the prohibition, others wished to annul it altogether, but in the end, after much argument, and after probably several propositions had been submitted in writing for settling the difficulty, they agreed to issue a consultation.

It was a curious document, that writ of consultation, drawn up

¹ Hatfield MSS., 134, f. 126. Holograph. October 19, 1607. Dr. Gardiner gives this date (*History of England*, II. 39) as "November 7". But the letter is plainly endorsed on the back in Cecil's own hand: "The K. to me. October 19, 1607."

early in October, 1607.¹ In one sense it deprived the Commission of authority, in another it fully recognized the whole of its contentions. The Commission was authorized to proceed "with all due and proper speed according to your ecclesiastical authority against the schism, heresy, impious error or pernicious opinions of the aforesaid Nicholas Fuller". In truth, although these phrases seemed to deny power to proceed in the present instance against Fuller, who was indeed accused of slander and contempt and not of heresy and error, they nevertheless did sanction action by the Commission, for several charges concerning heresy and schism had been included (probably by chance) among the counts of the indictment. In any case, if the commissioners were the sole legal interpreters of the language of the consultation, it would have been plain enough from their standpoint that Fuller's views were, to say the least, "pernicious opinions". The gist of the consultation contained, therefore, nothing to hinder the Commission's action.

Having finished the usual form of consultation, the judges added several sentences in the nature of explanations and qualifications. "Nor is there any question by us made, of the authority or validity of the letters patents to you and to others directed, nor of the exposition of the statute of 1 Elizabeth, nor of certain scandals or other matters which by the Common Law and the Statutes of this Realm of England are to be punished or concluded." Technically of course these phrases were not part of the consultation and were merely declaratory of the opinions of the judges. The innuendo therefore in the last clause insinuating that Fuller could be tried only at common law even for the slander of the High Commissioners was of no legal effect, and if it might have been, the two preceding clauses completely nullified it, inasmuch as they declared valid the letters patent

¹ The consultation will be found in Latin in Lansdowne MSS., 1172, f. 97. The wording in the text is an attempt to render it freely in the legal English of the period. It was certainly issued late in September or early in October before Fuller's conviction by the Commission (it must be borne in mind that he had been simply arraigned in July) and not, as Dr. Gardiner states, in November after his conviction. Dr. Gardiner also treats the document printed in 12 Coke's *Reports*, f. 41, as the actual consultation. In an article in the *English Historical Review* for October, 1903, the present writer has stated his reasons for regarding as highly suspicious anything in that volume of the *Reports* which does not fully agree with the evidence from other sources. But in this case the document is so long and rambling and so devoid of legal form that it can hardly be credited as against the one in the Lansdowne MSS. It is not on the face of it a consultation, but an argument why the consultation should contain certain limiting clauses. There is no proof that it was more than a private memorandum of Coke's own ideas, and there is no reason at all to suppose that it was ever meant to have legal effect. There is just enough similarity between it and the Lansdowne paper to make it reasonably certain that both refer to the same event.

and the commissioners' exposition of the statute of 1 Elizabeth, both of which contained ample authority to try slanders of all descriptions whether against the Commission or not.¹ In fact the consultation contained so many mutually contradictory phrases and so many antagonistic claims that it could hardly be considered to have placed a limitation upon the Commission's powers. By refusing to support Fuller's appeal and assume jurisdiction of the case themselves, the judges had abandoned him to the discretion of the High Commission.

Despite the confused phrasing of the writ, the ecclesiastical authorities attempted to follow its letter and spirit, in order to give Fuller and the judges themselves no cause for complaint. They therefore arraigned him for schism and erroneous opinions and probably on October 20 or 21 convicted him, fined him £200, and sentenced him to imprisonment during pleasure.²

But Fuller had by no means exhausted the resources of the common law, and found the judges ready to assist him in pushing the matter still further. His counsel applied to the King's Bench for a habeas corpus³ which should force the keeper of the prison where Fuller lay to produce him at the bar of the King's Bench and state his authority for detaining him. The habeas corpus issued in the first week of November, raised a new question for the judges to decide: was the unquestionably regular process of commitment used by the High Commission legal by strict law? The argument over the prohibition had debated the respective rights of the Commission and the King's Bench to punish Fuller for his slander of the former court which he had uttered in a pleading before the latter. Now

¹ Just at this time the common law courts were trying to draw all cases of slander from the ecclesiastical judges to their own tribunals.

² *12 Reports*, 44. This happened before November 14, because on that date Fuller's fine was granted to John Patten of the king's closet. State Papers Domestic, Docquet, November 14, 1607. On October 19 the King wrote to Salisbury to bear in mind Fuller's case (Hatfield MSS., 134, f. 126.) and on October 23 Lake wrote to Salisbury that the King was "exceedingly well pleased" about "the prohibition". (Hatfield MSS., 122, f. 150.) When Fuller's case came up again it was on a habeas corpus. Hence this trial would seem to have come on October 20 or 21.

³ Dr. Gardiner here inserts the famous altercation between Coke and the King in which the chief justice told James that he was not fitted to understand the law of England by the ordinary rules of reason, and that the King himself was in fact protected by the law. The present writer has attempted to show in the *English Historical Review* for October 1903: (1) that the date in *12 Coke's Reports* is a year out of the way; (2) that the account he gives of the affair is at least partially wrong, if we can judge from the holograph notes in Lansdowne MSS., 160, taken by Sir Julius Caesar while the debate took place; as well as from other contemporary letters; (3) that the whole question at issue was that of the legal status of tithes. The affair therefore did not grow out of Fuller's case and had nothing to do with it.

however Fuller brought to the fore precisely the question which he had argued in the objectionable speeches that had first embroiled him with the Commission—the right of that court to commit him to prison at all. He made no charge that the process used was irregular, that he was committed for a crime for which others were not detained, nor that the Commission possessed no such authority in its letters patent. He virtually declared it illegal and asked confirmation of his opinions from the King's Bench.

This movement brought him into collision with the state. Hitherto, James and Salisbury had been interested observers of the case, concerned lest it should take a dangerous turn. They were now perfectly satisfied that the affair had gone far enough. It was high time they took a hand in the matter if they were to prevent the discrediting of the Commission by so "euill" a "uillaine" as Fuller. James considered his prerogative threatened and in fact there could be no question that he was right in so thinking. Stripped of its legal technicality, Fuller's argument said nothing less than that the letters patent gave the Commission a power which the statute of 1 Elizabeth did not confer upon the king, and which therefore he could not delegate to a Commission. Both Elizabeth and James had issued such letters patent, and if they had done so, as Fuller claimed, without authority either from their prerogative or from statute, they had committed a grave illegality; and what was worse, if the contention was true, the crown did not possess an important ecclesiastical prerogative which it had long exercised. James was therefore literally right in asserting that his prerogative was at stake. While apparently arguing merely that the High Commission had illegally imprisoned one Nicholas Fuller, the lawyers would be in reality debating whether or not the king possessed the power to create such a High Commission as his letters patent of 1605 specifically sanctioned. It was James's unshakable opinion that "the absolute prerogative of the Crown" was "no subject for the tongue of a lawyer", nor was "lawful to be disputed."¹ He therefore directed Salisbury to take charge of the

¹ *Works of James I.* (London, 1616) p. 350.—The case was duly appreciated and followed outside the court. On November 22, William Walton met George Knight at Paul's; "Howe nowe Mr. Walton, said Knight, do you thinke to carry away the cause betweene you and Mr. Ponde in this manner from my Lorde of Canterburie round before the judges of the King's Bench. . . . the Lorde Archbyschopp I warrant you will bring the same therethence againe in spight of their teethes. . . . His Grace had allready committed one Fuller to the Fleete and so would them (*i. e.*, the judges of the King's Bench) if they would not grant a consultation." Walton's Deposition. State Papers, Domestic, James I., XXVIII., no. 94.

defence of "his honour", and see that no argument took place over his prerogative: Hobart, the attorney-general, was ordered to argue against Fuller in support of the High Commission and to prevent any dispute as to its legality or illegality.

On Tuesday, November 24, 1607, the warden of the Fleet Prison brought Fuller to the bar of the King's Bench as the habeas corpus required.¹ The court room was thronged with an interested audience, for the case had by this time attained a certain amount of notoriety. When the warden had presented the warrant for Fuller's commitment and when the document had been read, Fuller declared that he wished to except to it, "both in matter and forme". In the first place he had not spoken the words with which it charged him; secondly, if he had, he had uttered them merely "by way of argument" for his client, a fact which he thought ought to be taken into account, and of which he found no mention in the return. It seemed essential to him, he said, that the return should state the truth and that it should do so in proper form. He therefore excepted to it as insufficient.

Hobart, the attorney-general, argued on the other hand, that the King's Bench had no authority to examine the facts of the case in order to determine whether or not they justified any action at all, for that court had recognized in its own consultation that it had no right to try the substance of the charge against Fuller, and therefore no jurisdiction to decide whether or not the facts of the case supported the warrant. If the warrant alleged a good *prima facie* cause of imprisonment and had been made out in due form, it was sufficient in law, he declared, to keep Fuller in the Fleet. Unless it showed on its face that the Commission had proceeded against him in a manner forbidden by the consultation, the judges must declare it valid. He then compared the return with the consultation and showed beyond doubt that the two agreed. With this argument, which was in truth good law, the judges were satisfied and remanded Fuller to prison. In their opinions, they added, wrote Salisbury to James, "larg profeshions how much it became them in duty to eschew any blemishe to such a commission", and made in fact no scruple of declaring that they believed he had uttered all the words charged against him, and that he ought to be punished for such an offence. Fuller was completely defeated, but he was not yet overwhelmed. He said that he had been without counsel to defend him and begged for a new hearing where he might be privileged

¹ Hatfield MSS., 124, ff. 137 b, 138 a. Salisbury to the King. Holograph draft, corrected. This was the report sent off that evening to James, who was outside London, hunting.

to have lawyers on his behalf. After a good deal of hesitation, the judges granted the request, expressing at length their surprise at his continued intractability and their hopes that when he returned he would make a complete submission instead of aggravating his offence by new obstinacy.

The judges' apprehension of further insolence from Fuller was shared by James and Salisbury, both of whom believed that too much consideration had already been shown so graceless a rogue. To them, the writs of habeas corpus to Ladd and Mansel, the prohibition and consultation, and then the habeas corpus to Fuller himself, seemed to point either to an opinion among the judges that the High Commission was illegal, or to the judges' desire to expand their jurisdiction regardless alike of the character of the cause they espoused or of the effects of their acts upon the safety of the state. When, therefore, after refusing to maintain three such writs in succession, the judges allowed Fuller a new hearing and gave him, contrary to all common-law precedent, the privilege of counsel, James was frankly puzzled. He strongly suspected them of some purpose of their own which boded ill to him and his prerogative and which they would stick at nothing to accomplish. For the nonce, however, he found scant confirmation of his fears.

The second hearing took place on Thursday, November 26.¹ Quick to appreciate the legal situation, Fuller saw that he must attack not the substance but the form of the warrant whose validity was the present issue, and he was keen enough to direct his counsel to cling fast to their legal exception and say nothing about the illegality of the Commission or the substance of his case before that court. His lawyers therefore argued that the warrant, to be good, must show on its face that the Commission possessed from the King sufficient authority to fine and imprison Fuller. According to the return the Commission had imprisoned Fuller because of schism and heresy and had left it to be assumed that it possessed sufficient authority for its action. Although there could be no doubt, continued the lawyers, that it had the authority, and although the judges themselves might know it, they could not take legal cognizance of it unless that fact was expressed in the return. The judges were visibly impressed with this argument, which was at least specious. In his reply, Hobart met the objection by stating that the contents of royal letters patent and of the statutes of the realm were public and did not need to be pleaded specially and mentioned in every act performed under their authority, for it was part of

¹Our sole authority is again Salisbury to the King. Draft corrected by Salisbury himself. Hatfield MSS., 123, f. 59. · November 28, 1607.

the judges' duty to keep themselves informed of the contents of such documents. This argument won the day and the judges remanded Fuller to prison for good and all.

But they wove into their speeches various statements of political theory which, with Fuller's pamphlet, later published, mark the case as important in the annals of English constitutional history. They declared that "they were one of the Kinges strongest armes", and dilated upon their own importance and dignity. They hoped, they said, that all men who had spoken disrespectfully of their authority would "learn and understand" that the temporal courts possessed a perfect right to grant prohibitions, and intended to continue issuing them whenever they saw fit. Their intention to grant them in instances like Fuller's was expressed in the declaration that all prohibitions issued in the past had been properly granted.

When the news reached James, who was hunting outside London, he was at once pleased and displeased. So satisfactory was the settlement of the case to him that he sent profuse thanks to all who had labored to bring it about, especially to Chief Justice Coke of the Common Pleas, who had been playing the mediator between the Commission and the King's Bench. But he declared and

bownd it with an oath that the judges hed don well for themselves as well as for him for that he was resolu'd if they had don otherwise and mainteyned their habeas corpus he wold haue committed them. And uppon that point which your lo: mentioneth of their declaration that they wold grant prohibitions he spake angrily that by their leaves they should not use their libertie therein but be prescribed.¹

Fuller returned to the Fleet prison and soon began to try what could be accomplished toward freeing himself by his own submissiveness and his friends' importunity. After the second hearing he had intimated to Hobart while still in the court room, that "if he had offended" he was sorry and begged pardon, but was at once assured that such conditional submissions were of no avail and that a complete retraction of his words without "ifs" and reservations was required. Within a week after his recommitment, he forwarded to the archbishop a submission which seemed at the moment likely to satisfy all parties.² To prepossess the authorities in his favor, his wife journeyed down to Newmarket over the bad roads, to present a petition to James on her husband's behalf. Lake and other officials, getting a sight of it, persuaded her to redraft it into less enigmatical shape. She presented the altered petition

¹ Hatfield MSS., 123, f. 55 (November 27, 1607, Lake to Salisbury, holograph); and Hatfield MSS., 123, f. 66 (November 30, 1607, same to same).

² *Ibid.*, f. 90 (December 9, 1607, holograph, same to same).

to James just as he was starting out on the hunt. The king, in good humor at the prospect of his favorite sport, received it good-naturedly, remarking that he was glad Fuller was penitent.¹ The lady returned to London to importune Salisbury in the same manner.

Fuller himself was a chief bar to his own freedom, for after all he refused to make the final submission required of him. Moreover his wife and friends, for some inexplicable reason, secured from him a retraction of his first submission,² and then, as if they had not thereby placed him in sufficient jeopardy, proceeded with unaccountable stupidity or rashness to publish about the middle of December some of his letters written since his confinement, and a pamphlet which purported to be the very speech for which he had been fined and imprisoned by the High Commission. If they believed that these documents would start a wave of public opinion in his favor which would compel the government to release him, they totally miscalculated the number of Englishmen who favored Fuller's views, and failed to see the hopelessness of reaching them. In truth they only placed him in greater danger, for while no one gave serious attention to the pamphlets, the government visited its wrath upon Fuller.

Fuller, however, insisted that he knew nothing of the printing of the speech, and after examining him thoroughly, the attorney-general concluded that he was telling the truth.³ To show his penitence, Fuller at once wrote to the archbishop and to the Company of Stationers to urge the suppression of the pamphlet.⁴ He further claimed that (as was evident enough) it was not the speech that he delivered, but another that he intended to use when he was incarcerated. However that may have been, the pamphlet stated on its title-page that it was the very speech for which Fuller had been fined and imprisoned, but it contained not one syllable of the disrespectful words about the High Commission which had really caused his punishment and added a great many highly offen

¹ Hatfield MSS., 123, f. 90 (December 9, 1607). On December 10, Fuller's fine was taken from Patton to whom it had been granted, apparently because it had been remitted. State Papers, Domestic, Docquet, December 10, 1607.

² Chamberlain to Carleton, January 5, 1607/8, State Papers, Domestic, XXXI. f. 2.

³ Hobart to Salisbury, Hatfield MSS., 124, f. 81, undated. Dr. Gardiner places this letter in January, 1607/8, but it seems to belong here. Chamberlain says distinctly that Fuller's friends published several books in December, and Hobart speaks here of "any of the books" and later mentions twelve; whereas Whyte, on whose letter in Lodge, *Illustrations*, III. 225, Dr. Gardiner depended, mentions but one book.

⁴ Fuller's Submission, Hatfield MSS., 124, f. 59.

sive statements regarding the royal prerogative which it seems fairly certain he never uttered before either the High Commission or the King's Bench. In general, moreover, it displayed Fuller as a learned and conservative lawyer, seeking truth and justice, and as a valiant defender of English liberty. In fact it made him seem like a worthy, patriotic man oppressed by a tyrannical government, which he had provoked by revealing its misdeeds. And posterity, satisfied to derive its information from the same source, has held almost universally a similar opinion of him.

Fuller was represented as declaring that "the lawes of England are the High Inheritance of the Realme by which both the King and the subjects are directed". "Without lawes, there would be neither King nor inheritance in England, which lawes . . . are so fitted to this people and this people to them as it doth make a sweet harmonie in the government." The law, continued this remarkable document, which is equally important and equally a landmark whether Fuller wrote it or not, "admeasureth the King's prerogative so as it shall not extend to hurt the inheritance of the subjectes. And the law doth restrayne the liberall words of the King's grant for the benefit both of the King and the subjects and to the great happines of the Realme, especially when the Judges are men of courage, fearing God, as is to be proved by many cases adjudged in these Courtes of King's Bench and Common Pleas, which Courtes are the principall preservers of this high inheritance of the law." The king might not dispense "with the common law nor alter the same . . . nor put the subjects from their inheritance of the law . . . which was alwayes accompted one of the great blessings of this land, to have the law the meatyeard and the Judges the measurers. For in all well governed Commonwealthes, Religion and Justice are the two principall pillars wherein the power of God appeareth."

These phrases alone suffice to give this pamphlet, and Fuller's case, a place in English constitutional history, for these are among the very first enunciations, if not the first, of that great theory of English constitutional law and history which Hakewill was to use so effectively in the case of *Impositions* in 1610, and which St. John was to render ever memorable in the great case of *Ship Money* in 1637. Some of the best known sentences attributed to Chief Justice Coke might be almost a quotation from this pamphlet. The brochure became so well known and was so much admired by the radical party that it was reprinted in 1641 as a manifesto of the Great Rebellion.

Whatever may be the historical importance of this pamphlet,

certain it is that it was intentionally printed to give an entirely false view of Fuller and of his treatment by the High Commission. He was by no means innocent of reprehensible conduct, and the High Commission was not guilty of harsh or unusual measures toward him. Considered from the point of view of modern ideas on free speech and general leniency toward criminals, the punishment was both severe and unwarranted. But we give such a judgment because we believe it wrong to fine or imprison anyone for his utterances and because most historians would say that Fuller told the truth when he said that the High Commission was illegal. At that time, however, literally no one advocated free speech, and very few indeed, and those mostly men of Fuller's stamp, had any doubts in regard to the legality of the High Commission in the year of grace 1607.

In view of the provocation, the government treated Fuller with much leniency. None of the letter-writers of the time would have been surprised to have seen him "shrewdly handled", but he was allowed to pay his fine about December 30,¹ and after some further trouble over the form of his submission, he was released on January 8, 1607/8.² Soon after, a new book appeared "on the discipline of the Church" which the government suspected emanated from Fuller, and therefore January 20 found him a close prisoner of the Privy Council in the custody of the Dean of St. Paul's Cathedral.³ Late in February or early in March, he drew up another submission⁴ which was apparently satisfactory, for about April 10 he was released under bonds to secure his good behavior, and licenced to practise at the bar till his case had been heard in the Star Chamber.⁵ In July following the matter was not yet concluded and in August it was still dragging along.⁶ In the fall of the year 1608, Fuller was probably freed.

Thus by the hand of chance, Nicholas Fuller became famous for a speech which he never delivered and which he perhaps did not write in the form in which posterity has read it. He has been called a martyr to the cause of liberty, when, in reality, judged by

¹ Chamberlain to Carleton, December 30, 1607, State Papers, Domestic, James I., XXVIII., f. 128. Remitted December 10, the fine seems to have been reimposed after the appearance of his books.

² Chamberlain to Carleton, State Papers, Domestic, James I., XXXI., f. 4. January 8, 1607/8.

³ Lodge, *Illustrations*, III. 225. Hatfield MSS., 124, f. 59.

⁴ This is connected with the paper in Hatfield MSS., 124, f. 59.

⁵ Additional MSS. (British Museum) 11402. Abstract of Privy Council Register, under the date April 10, 1608. The original register is lost.

⁶ Notes by Bacon, July 25, 1608. James Spedding, *Life and Letters of Francis Bacon*, IV. 53; August 6, 1608, *ibid.*, IV. 95.

the standards of the time, he committed a serious offence and displayed considerable disrespect for authority. Still, every one who pleads against injustice couched in the forms of law must appear as a disorderly and factious person. On the other hand, many seem to feel that the High Commission was at liberty to decide whether or not it would proceed against Fuller. Yet it is clear that it had no choice, for if it was legally a court, it had no other recourse than to proceed against a man who denied its right to exist. To have tamely allowed Fuller to go unchallenged after three such public offenses, would have meant that the High Commissioners themselves believed their powers illegal. It is one of the fundamental maxims of law that no court can entertain any plea against its own legality, nor under any circumstances fail to do its uttermost to punish the offender, for its own existence is at stake. In reality there comes at such times an irreconcilable clash between the conscience of the man pleading for liberty and the undoubted duty of the court he questions. He feels himself impelled by the forces within him to cry in the spirit of Luther at Worms, "I cannot do otherwise." But the court at whose bar he stands owes a duty to society which is not less plain: the judges may sympathize with his plea, but they know that their only duty is to apply the rules of the institution as they find them. Not on them but upon the past generations that created the institution rests the responsibility. Whether or not the nation would have been happier had that institution never been evolved, time alone can prove, and at any rate they have no right to decide so momentous a question. As against the sanction of the whole community, comes the cry of this one individual, with nothing to prove him a herald of a great future and not a harbinger of evil. The safety of society demands that the burden of proof rest upon him who desires a change.

The barrister of Gray's Inn was therefore in the wrong; yet if he sinned, he sinned gloriously. He did oppose the wishes of the king in a truly constitutional manner, claiming the laws of the land as his defence; the cause he espoused became in later years the popular standard; his ringing words heartened the members of the Long Parliament in their belief in the righteousness of their cause. The name of Nicholas Fuller thus deserves to live not as that of a victim of the petty tyranny of a querulous government, but as one of the earliest of those great men who freed Parliament from the yoke of the Crown.

ROLAND G. USHER.